YALE LAW JOURNAL

Published monthly during the Academic Year by the Yale Law Journal Co., Inc.
Edited by Students and members of the Faculty of the Yale Law School.

SUBSCRIPTION PRICE, $4.50 A YEAR SINGLE COPIES, 80 CENTS
Canadian subscription price is $5.00 a year; foreign, $5.25 a year.

CONTRIBUTORS OF LEADING ARTICLES IN THIS ISSUE

ROBERT S. STEVENS is draftsman of the Uniform Incorporation Act for the National Conference of Commissioners on Uniform State Laws. He was in practice for some time and is now Professor of Law, Cornell University.

STEWART CHAPLIN is a member of the bar of New York and professor of law in the New York Law School. He is author of *Suspension of the Power of Alienation and Postponement of Vesting; Express Trusts and Powers.*

FRANKLIN D. JONES, formerly attorney and member of the Law Board of Review for the Federal Trade Commission, is a member of the Washington, D. C., bar. His published works include *Trade Association Activities and the Law.*

CROSS-EXAMINATION TO IMPEACH

Few phases of the law of evidence present such a maze of confused and arbitrary rulings as cross-examination to impeach. Most courts, we are told, have taken the view that the limits of this type of investigation are in the discretion of the trial judge.[1] But this does not apply in every jurisdiction to all

[1] 2 WIGMORE, EVIDENCE (2d ed. 1923) § 983. For recent pronouncements

kinds of questions tending to discredit.[2] Nor is it possible in any jurisdiction to predict with much confidence when a reviewing court will hold that this discretion has been abused.[3]

The Supreme Judicial Court of Massachusetts has at least made such prediction more certain than it has been in that state hitherto.[4] In *Commonwealth v. Sacco*, 151 N. E. 839 (Mass. 1926) the court holds that as long as the evidence admitted has a degrading tendency, there can be no abuse of discretion. No other inference is possible.[5] The cross-examination in this case was as broad as could well be imagined. The defendant, on trial for murder in a hold-up, was asked about his love of money; his love of this country; his information relative to the charitable activities of Harvard; his knowledge of the number of school children in Boston; his subscription to anarchist

of the rule see Lamb v. State, 20 Ohio App. 461, 152 N. E. 678 (1926); Grose v. State, 149 N. E. 722 (Ind. 1925); Shores v. Simanton, 130 Atl. 697 (Vt. 1925); Middleton v. State, 162 Ark. 530, 258 S. W. 995 (1924).

[2] WIGMORE, *op. cit. supra* note 1, at 373, showing that the judge's discretion may cover the relevancy of the questions, or their policy, or both. Compare also the varying rules as to arrests, indictments, etc. mentioned *infra*.

[3] Compare Stanley v. State, 285 S. W. 17 (Ark. 1926) with Daniels v. State, 168 Ark. 1082, 272 S. W. 833 (1925); State v. Scott, 194 Iowa, 777, 190 N. W. 370 (1922) with State v. Burris, 198 Iowa, 1156, 198 N. W. 82 (1924); Taylor v. Conn. Fire Ins. Co., 285 S. W. 1012 (Mo. App. 1926) with Asadorian v. Sayman, 282 S. W. 507 (Mo. App. 1926); People v. Buzzi, 238 N. Y. 390, 144 N. E. 653 (1924) with People v. Kasprzyk, 209 App. Div. 449, 204 N. Y. Supp. 786 (4th Dept. 1924).

[4] WIGMORE, *op. cit. supra* note 1, § 983, note 5, lists Massachusetts as forbidding inquiry into collateral misconduct on cross-examination. In § 987, page 397, n. 1, he shows that up to 1921 Massachusetts varied between that rule and that of the judge's discretion. The cases since Wigmore wrote, however, indicate definite adoption of the discretionary rule. See Commonwealth v. McDermott, 152 N. E. 704 (Mass. 1926); Commonwealth v. Sansone, 252 Mass. 71, 147 N. E. 574 (1925); Commonwealth v. Gettigan, 252 Mass. 450, 148 N. E. 113 (1925); *cf.* Commonwealth v. Vandenhecke, 248 Mass. 403, 143 N. E. 337 (1924). JONES, EVIDENCE (2d ed. 1926) § 2364 seems to include Massachusetts among the states forbidding this type of cross-examination; but see § 2365, n. 2.

[5] The words of the Sacco case supports this inference; so do its facts. The cross-examination in Commonwealth v. Homer, 235 Mass. 526, 127 N. E. 517 (1920) and in Sullivan v. O'Leary, 146 Mass. 322, 15 N. E. 775 (1888) was not so broad as in the principal case. Yet the action of the trial court was held error. Hence it may be concluded that Massachusetts is now willing to a greater extent than formerly to commit the outer limits of cross-examination to the judge. As indicated *infra* note 11, the great majority of states following the discretionary rule have reversed on narrower cross-examination than that in Commonwealth v. Sacco.

[6] The questions as given in 151 N. E. at 856 are:

"Is your love for this country measured by the amount of money you can earn here? What is the reason you came back from Mexico if you did not love money then? Don't you know Harvard University educates more boys of poor people free than any other university in the United States of America? . . . . Don't you know that each year there are

papers; the coincidence of his views with those of a named anarchist; his avoidance of conscription; and whether he was a man who would tell the jury that the United States was a disappointment to him.[6] The Supreme Court says:[7] "These questions as well as the questions relative to the effect on his wife of his possible arrest and deportation for participation in movements inimical to the government, were within the rule that a witness may be cross-examined in the discretion of the judge to test his accuracy, veracity or credibility, or to shake his credit by injuring his character, and for this purpose his way of life, his associations, his habits, his prejudices, his physical defects and infirmities, his mental idiosyncrasies, if they affect his capacity, his means of knowledge, powers of discernment, memory and description may all be relevant."

This rule interpreted literally,[8] as it was here, may make prophecy as to what an appellate court will do more definite and sure. But it is submitted that this literal interpretation is one from which almost all courts theoretically following the same rule have withdrawn in dismay,[9] and that it is an interpretation which in the present state of American jurisprudence,[10] at least, may lead to the conviction of defendants for crimes which they never committed.

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scores of them that Harvard educates free? Did you intend to condemn Harvard College? Were you ready to say none but the rich could go there without knowing about offering scholarships? Do you know how many children the City of Boston is educating in the public schools free? Do you know it is close to one hundred thousand children? And do you subscribe to any papers? Was the printing of that paper stopped during the war? Was the printing of Le Mortelle stopped during the war? Were they anarchistic papers? Were any of the books that were in your house anarchistic? Were you aware of his views—Fruzetti's views—with respect to anarchy? Did you know what they were, yes or no? Were you afraid of deportation yourself on May 5th? Did you find out from him what he thought, what his views were with respect to anarchy? Were your views with respect to anarchy substantially the same as Fruzetti's? As far as you understood Fruzetti's views were yours the same, and you are a man who tells this jury that the United States of America is a disappointment to you? Are you, Mr. Sacco? Well, tell us about how disappointed you were, and what you did not find and what you expected to find. Are you that man? Why did you tell me a falsehood that on Thursday, the day before you read the account in the paper, you worked all day? And in order to show your love for this United States of America when she was about to call upon you to become a soldier you go away to Mexico? Mr. Sacco, that is the extent of your love for this country, isn't it, measured in dollars and cents?"

[7] 151 N. E. at 856.

[8] This interpretation is made only in cases where the judge has some discretion. The illogical character of the rule as to female witnesses as stated in Commonwealth v. Vandenhecke, *supra* note 4, is clear. So of the Massachusetts rule as to legal charges of crime, mentioned *infra*.

[9] See cases cited *infra* note 11.

[10] See WIGMORE, *loc. cit. supra* note 1: "If the discretion allowed by the preceding rule were properly exercised; if there existed at the American Bar in general that skill and professional self-restraint in cross-examination which is traditional at the English Bar; if there existed among the Judiciary the desire and the courage to check excesses of cross-examination

Apparently the Massachusetts court is now prepared to hold that the discretion of the trial judge can not be abused as long as the questions asked tend to show that the witness has not the same social, economic, and political background as the average juror. Few other courts have gone so far. Somewhere in the decisions of almost every state which intrusts to the trial judge control over cross-examination to impeach is found an express or implied limitation on that control.[11] And that limitation normally appears when the examination would lead rather

and to err if at all on the side of repression; and if the Judiciary were accustomed to exercise their powers fully and freely, there could be no better solution than to vest the control in that discretion. But the Judiciary today are not always inclined to show to the abuses of cross-examination the disfavor which those abuses deserve. . . . For this reason, as well as because of the usual unprofitableness of cross-examination to character, there is something to be said in favor of the rule that now obtains in several jurisdictions, by which such misconduct is forbidden to be inquired into at all. The rule of total prohibition of cross-examination . . . on these matters, has thus received sanction, and is perhaps the one most consonant with the needs of the time."

[11] Trenton Potteries Co. v. United States, 300 Fed. 550 (C. C. A. 2d, 1924), certiorari granted, 266 U. S. 597, 45 Sup. Ct. 96 (error to allow witness in Sherman Act case to be asked whether he did not know his firm had pleaded guilty to a violation of the act; and whether he did not know one with whom he dealt was under investigation by the Lockwood Committee); Stanley v. State, *supra* note 3 (error to permit proof on cross-examination that accused had shot two other men); State v. Scott, *supra* note 3 (error to allow cross-examination of accused as to whether he was named after Robert E. Lee; if he had Indian blood; if he killed a man in Arkansas; if he lay in wait to kill another; if he pointed a revolver at certain persons or cursed a certain woman); Forsyth v. Nostrand, 201 Mich. 558, 167 N. W. 1002 (1918) (cross-examination as to other contracts); State v. Miller, 151 Minn. 386, 186 N. W. 803 (1922) (error to allow cross-examination as to threats to kill others, even though accused had said he thought deceased was one Bowman and that he knew of no other enemies); Razee v. State, 73 Neb. 732, 103 N. W. 438 (1905) (error to permit cross-examination of defendant to domestic relations); People v. Buzzi, *supra* note 3 (error to allow cross-examination of defendant and her sisters as to immorality of another sister, and to permit questions to defendant as to fights with her husband and the wife of the deceased); People v. Joyce, 233 N. Y. 61, 134 N. E. 836 (1922) (error to allow cross-examination of defendant as to imprisonment as soldier in France); State v. King, 204 N. W. 969 (N. D. 1925) (robbery—error to allow cross-examination of accused as to gouging out one man's eye and shooting another, although this evidence was stricken and the jury admonished to disregard it); Gabler v. State, 243 Pac. 981 (Okla. Cr. App. 1926) (in liquor prosecution error to allow cross-examination of accused giving the impression counsel knew he made and sold liquor); State v. Bingham, 131 S. E. 603 (S. C. 1926) (error to allow cross-examination as to other homicides); State v. Cottrell, 56 Wash. 543, 106 Pac. 179 (1910) (in forgery error to allow cross-examination as to other frauds); Dungan v. State, 135 Wis. 151, 115 N. W. 350 (1908) (error to allow cross-examination of defendant as to wife's immorality).

See also the statements in State v. Haab, 105 La. 230, 29 So. 725 (1910)

to arousing prejudice against the witness as a member of society than to pointing to the probability of falsehood in his story.[12]

The line between these two tendencies is difficult to draw, so difficult that in Massachusetts the attempt has now been almost wholly abandoned. Yet the result of failure to draw it here was that the Commonwealth was allowed to ask, at a time of intense popular feeling against anarchists and all opposed to the established order, questions emphasizing in a picturesque and telling manner the political views of a defendant on trial for a crime which admittedly had not the slightest relation to those views.

The artificial character of the divisions of this subject is illustrated by another point in the same case.[13] A state's witness was asked whether he was not a defendant in a criminal case in this court. The question and answer were excluded. When the defense announced that it had in its possession the records of a larceny case where the witness had pleaded guilty, the case had been filed, and the defendant given probation, the court declined to allow cross-examination on the point because the case had been filed. This ruling is held correct because there had been no conviction. But who can doubt that being a defendant in a criminal case to the layman injures the character, and is under the logic of the Sacco case admissible to injure it? And if this is true, is not a plea of guilty to a charge of larceny at least as relevant to credibility as a knowledge that "Harvard College educates more boys of poor people free than any other university in the United States of America" ?[14]

(questions must have legitimate bearing upon credibility); Annarina v. Boland, 136 Md. 365, 380, 111 Atl. 84, 89 (1920); Territory v. Chavez, 8 N. M. 528, 532, 45 Pac. 1107, 1108 (1896); Hanoff v. State, 37 Ohio St. 178, 183 (1881); State v. Hill, 52 W. Va. 296, 43 S. E. 160 (1903) (degrading questions should rarely be tolerated).

[12] The cases cited *supra* note 11 indicate the outer limits of the judge's discretion. Inner limits are set in the following: State v. Poston, 199 Iowa, 1073, 203 N. W. 257 (1925) (error to decline to permit cross-examination of prosecutrix in rape as to whether she had not suffered from melancholia and accused others of assaulting her); Taylor v. Conn. Fire Ins. Co., *supra* note 3 (error to exclude cross-examination of plaintiff in action on policy as to relations with man not her husband); Wadlington v. Coyne, 207 N. W. 539 (S. D. 1926) (error to exclude questions to plaintiff as to use of assumed name where issue depended wholly on his veracity). The power of the judge to exclude testimony relevant to truthfulness is apparently greater in Massachustts than in many other states. See Commonwealth v. Sansone, and Commonwealth v. Vandenhecke, *supra* note 4.

[13] 151 N. E. at 851.

[14] Here the literal interpretation mentioned in note 8 *supra* is not made. If almost anything tending to diminish the witness in the eyes of the jury can be admitted, what difference does it make from what kind of facts the diminution arises? Some special method of proving convictions may of

Perhaps Dean Wigmore's tentative suggestion is the only solution: to forbid cross-examination of this kind.[15] Still it does not seem necessary to advocate so extreme a measure. In *State v. Schleifer*,[16] a case in some respects similar to this, the Connecticut court reaffirmed its rule that cross-examination on matters not relevant to veracity is improper. While the discretion of the judge may cover the period and extent, "the question of relevancy," the court said, "is never within the discretion of the trial court." [17] In the principal case the questions asked had no bearing on veracity. If they had been excluded, and only such examination permitted as would have affected the truthfulness of the witness, the state would not have been unduly restricted, nor the defendant able to claim prejudice.

What should be required as proof of a conviction when used to impeach is beyond the scope of this paper. It may be suggested in passing that the record of a plea of guilty would seem to be as conclusive of guilt as the verdict of a jury and the sentence of a judge.[18] Whatever may be the case in other juris-

course be required. But if the sole question is whether the question will degrade the witness, it would seem that arrests, indictments and trials, to say nothing of pleas of guilty, should logically be admitted. Some courts following the discretion rule decline to draw any distinction between these types of degradation, and admit legal charges and confessions of crime in the discretion of the judge. Pillow v. State, 160 Ark. 195, 254 S. W. 462 (1923); *cf.* Taylor v. State, 169 Ark. 589, 276 S. W. 577 (1925); Wallace v. State, 41 Fla. 547, 26 So. 713 (1899); Denny v. State, 190 Ind. 76, 129 N. E. 308 (1921); Livingston v. Heck, 122 Iowa, 74, 94 N. W. 1098 (1903); State v. Winters, 241 Pac. 1083 (Kan. 1926) (although the better rule is that an unproved charge should not be investigated); State v. Thompson, 108 So. 543 (La. 1926); Territory v. Chavez, *supra* note 11; State v. Jeffreys, 135 S. E. 32 (N. C. 1926); State v. Bacon, 13 Or. 143, 9 Pac. 393 (1886); Messer v. Commonwealth, 133 S. E. 761 (Va. 1926). See also cases collected in JONES, *op. cit. supra* note 4, § 2371, n. 12.

[15] *Supra* note 10. Elliott v. Boyles, 31 Pa. 65 (1857) is the leading case for this view. See also Woodward v. State, 19 Ala. App. 577, 99 So. 156 (1924); People v. Adams, 244 Pac. 106 (Calif. App. 1926) (under Calif. C. C. P. § 2051); People v. Gardiner, 303 Ill. 204, 135 N. E. 422 (1922); State v. Carson, 66 Me. 116 (1876); State v. Jenkins, 66 Mont. 359, 213 Pac. 590 (1923); Curtis v. State, 284 S. W. 950 (Tex. Cr. App. 1926); State v. Thorne, 39 Utah, 208, 117 Pac. 58 (1911). See also Idaho Comp. Stat. (1919) § 8038; but *cf.* State v. Fung Loon, 29 Idaho, 248, 158 Pac. 233 (1916) that the provision does not cover examination to a degrading occupation.

[16] 102 Conn. 708, 130 Atl. 184 (1925) (In a prosecution for solicitation, on cross-examination of the defendant, the court allowed the state to introduce letters showing that while serving the government he had preached anarchy among shipyard employees. *Held*, error.)

[17] 102 Conn. at 715, 130 Atl. at 188. See also State v. Schutte, 97 Conn. 462, 117 Atl. 508 (1922).

[18] The rules as to the meaning of conviction for impeachment purposes have been much affected by the rules as to the meaning of conviction to disqualify. In the latter case the tendency was to restrict incompetency

dictions, Massachusetts can hardly justify giving the narrowest possible range to the shortest and simplest method of impeachment, a conviction, and the widest possible range to the most protracted and dangerous method, cross-examination to an unconventional past.

R. M. H.

THE PRESIDENT'S POWER OF REMOVAL

The Constitution vests the power of appointment in the President, subject to the consent of the Senate,[1] but is silent on the power of removal, except in its provisions regarding impeachment.[2] It is well settled, however, that, at least in the absence of restrictive legislation, the President has power to remove his appointees, where their tenure is not fixed by the Constitution.[3] Moreover, statutory limitations do not affect the President's power of removal, when exercised by and with the consent of

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wherever possible. Consequently, a judgment without sentence, a conviction in another state, and a conviction followed by pardon did not disqualify. Faunce v. People, 51 Ill. 311 (1869); Logan v. United States, 144 U. S. 263, 12 Sup. Ct. 617 (1892); Boyd v. United States, 142 U. S. 450, 12 Sup. Ct. 292 (1892). Impeachment presents no such struggle against an arbitrary rule. The aim is simply to find an adequate basis for holding that a witness has committed a crime which under popular notions discredits him. Hence conviction in another jurisdiction is admissible. Attorney General v. Pelletier, 240 Mass. 264, 134 N. E. 407 (1922). So is a conviction from which an appeal is pending. Treadway v. State, 235 Pac. 929 (Okla. Cr. App. 1925). *Contra:* Foure v. Commonwealth, 214 Ky. 620, 283 S. W. 958 (1926); State v. Shelton, 284 S. W. 433 (Mo. 1926), Blair, C. J., Atwood, and White, JJ., disagreeing with the opinion on this point, and Graves, J., dissenting generally. Nor will a pardon make the conviction inadmissible. State v. Serfling, 131 Wash. 605, 230 Pac. 847 (1924). In line with this tendency, some courts have held that a plea of guilty though not followed by fine or imprisonment is sufficient proof of guilt for impeachment purposes. State v. Merrell, 263 S. W. 118 (Mo. 1924); People v. Cardinelli, 297 Ill. 116, 130 N. E. 355 (1921). The attitude of the court toward the Probation Act, § 2, is explained in People v. Andrae, 295 Ill. 445, 129 N. E. 178 (1920); People v. Jacobs, 238 Pac. 770 (Calif. App. 1925). *Contra:* Remington v. Judd, 186 Wis. 338, 202 N. W. 679 (1925) (on a plea of *nolo contendere* followed by dismissal). Where the plea of guilty is followed by sentence, *a fortiori* the same result occurs. Coles v. McNamara, 241 Pac. 1 (Wash. 1925). The only important difference of opinion here seems to be as to the effect of sentence on a plea of *nolo contendere*. The conflict is illustrated by Collins v. Benson, 81 N. H. 10, 120 Atl. 724 (1923) excluding the evidence and State v. Radoff, 248 Pac. 405 (Wash. 1926) admitting it. See (1926) 14 GEORGETOWN L. J. 297.

[1] U. S. CONST. Art. II, § 2.

[2] U. S. CONST. Art. II, § 4.

[3] See Ex parte Hennen, 13 Pet. 230, 259 (U. S. 1839); Wallace v. United States, 257 U. S. 541, 544, 42 Sup. Ct. 221, 222 (1922).

the Senate.[4] And the Senate by confirming the appointment of a successor, is considered as having concurred with the President in the removal.[5] It is also settled that where Congress has exercised its constitutional power to vest the appointment of "inferior" officers in the heads of departments, it may determine the method of their removal.[6] The question remains, however, whether Congress has power to make the consent of the Senate a condition of removals by the President.[7]

Until 1863 this supposed power was never exercised. In 1789 the first Congress, by a small majority in the House,[8] and by the deciding vote of Vice President Adams in the Senate,[9] voted not to grant the power of removal to the President, since he already had it.[10] The vote was then regarded as a legislative declaration that the power to remove officers appointed by the President with the consent of the Senate was vested in the President alone.[11] Provisions by the same[12] and later[13] Congresses for removals at the President's pleasure were made not in denial, but in recognition of this construction,[14] which went unquestioned until the increase in removals with the inauguration of the "spoils system" about 1830.[15] It was not, however, until 1863 that Congress abandoned its earlier decision by making the removal of the Comptroller of the Currency subject to the consent of the Senate.[16] But this departure went unnoticed until it was incorporated in the legislation resulting from the quarrel between President Johnson and the Republican Congress over

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[4] Military and naval officers. Keyes v. United States, 109 U. S. 336, 3 Sup. Ct. 202 (1883); Mullan v. United States, 140 U. S. 240, 11 Sup. Ct. 788 (1891). Civil officers. See Parsons v. United States, 167 U. S. 324, 343, 17 Sup. Ct. 880, 886 (1897).

[5] Wallace v. United States, 258 U. S. 296, 42 Sup. Ct. 318 (1922).

[6] United States v. Perkins, 116 U. S. 483, 6 Sup. Ct. 449 (1886).

[7] "The question has been expressly saved." See Wallace v. United States, *supra* note 3, at 545, 42 Sup. Ct. at 222.

[8] 29–22. (1789) 1 ANNALS OF CONGRESS, 614.

[9] C. F. ADAMS, WORKS OF JOHN ADAMS (1865) 450.

[10] The vote was taken on a bill establishing the Department of Foreign Affairs, and concerned the removal of the Secretary of Foreign Affairs. 1 Stat. 29 (1789).

[11] 5 MARSHALL, LIFE OF WASHINGTON (1807) 200; 1 KENT, COMMENTARIES (1826) *310; STORY, CONSTITUTION (1833) *§ 1543.

[12] 1 Stat. 87 (1789).

[13] 3 Stat. 582 (1820).

[14] For this interpretation, see Parsons v. United States, *supra* note 4, at 339, 17 Sup. Ct. at 885.

[15] On Mar. 23, 1830, Barton's resolution asserting the power to require the President to report to the Senate his reasons for removals was reported in the Senate. In 1835 the proposal was embodied in the Executive Patronage Bill which passed the Senate on two successive occasions, but failed of action in the House. See (1830) 6 Cong. Deb. 458; (1835) 11 Cong. Deb. 440.

[16] 12 Stat. 666 (1863).

the reconstruction of the southern states. The Tenure of Office Act of 1867,[17] passed over the President's veto, applied the removal clause to all presidential appointees, including heads of departments. Its purpose was to deprive the President of the control of federal patronage, and it was particularly designed to prevent the removal from office of Secretary of War Stanton. Two years later, when partisan anger subsided, the act was modified,[18] and in 1887 it was totally repealed.[19] But in 1872 the removal clause was unobtrusively re-enacted respecting postmasters,[20] and has remained in the statutes ever since.

It was under this legislation [21] that the recent case of *Myers v. United States*, 47 Sup. Ct. 21 (U. S. 1926) arose. On July 21, 1917, Myers was appointed first class postmaster at Portland, Oregon, for a term of four years. On February 2, 1920, he was removed from office by direction of the President, after he had refused to comply with a demand for his resignation. His removal was never approved by the Senate. On April 21, 1921, Myers brought suit for his salary from the date of removal to the end of his term. The Court of Claims gave judgment against him because of delay in suing.[22] In affirming this judgment, the Supreme Court denied laches, but held that the President has exclusive power to remove executive officers appointed by him with the consent of the Senate.[23]

This decision is ostensibly based on the legislative construction of 1789, and the reasons then advanced by Madison in its support. It is argued that the appointment and removal of officials are executive prerogatives included in the grant to the President of "the executive power," [24] that this power is subject only to limitations expressly stated, and that though the Constitution provides restrictions in respect to appointments, it contains none in respect to removals. To this seemingly sound construction, the dissent makes an equally convincing reply: that the Constitution authorizes Congress to establish certain "inferior" offices, among which postmasterships are included, and that the power to create involves the power to prescribe the tenure and the conditions when incumbency shall cease. These

[17] 14 Stat. 430 (1867).

[18] 16 Stat. 6 (1869).

[19] 24 Stat. 500 (1887).

[20] 17 Stat. 284, (1872) U. S. Comp. Stat. (1916) § 568.

[21] 19 Stat. 80, (1876) U. S. Comp. Stat. (1916) § 7190 provides that "postmasters of the first, second, and third classes shall be appointed and may be removed by the President by and with the advice and consent of the Senate and shall hold their offices for four years unless sooner removed or suspended according to law."

[22] 58 Ct. Cl. 199 (1923).

[23] The majority opinion is by Mr. Chief Justice Taft; Holmes, McReynolds and Brandeis, J. J., dissenting.

[24] U. S. CONST. Art. II, § 1.

arguments present merely a choice between conflicting implications. The history of legislative interpretation seems equally inconclusive. The original construction was made at a time when Congress considered it desirable for removals to be made by the President alone, and it did not long survive this view. Except as regards cabinet officers, the interpretation expressed in the removal clause of 1863 has since prevailed.

The decision in the *Myers* case has been criticized for having as its real basis political expediency.[25] But this factor seems to have been the controlling one in congressional interpretation, and seems now to afford the only substantial ground for judgment. The question remains, however, whether the recent decision *is* expedient. It is argued that the exclusive power to remove subordinates is indispensable to the President if he is to be held responsible for efficient administration.[26] But executive responsibility in the absolute sense prevailing in parliamentary governments does not exist in the United States, with its system of periodic elections. And as the dissent suggests, the danger of inefficiency and insubordination can be adequately provided against by implying in the President the power of suspension. Moreover, the doctrine of the separation of powers was adopted, not to promote efficiency, but to preclude the exercise of arbitrary power. The transfer of the power of removal from the President alone to the President and the Senate might not effectively prevent removals for political reasons,[27] but it at least would be a check on arbitrary and capricious action. While it seems desirable that the President should be able to remove members of his own Cabinet, it does not follow that he should have unrestrained power to remove "inferior" officers such as members of administrative commissions, or his appointees in the army or navy.[28] Their judgment should not be influenced by the possibility of summary removal in case of a difference of opinion with the President. Such, however, is the effect of the decision, unless Congress vests their appointment in the courts of law or in the heads of departments.[29] The decision may be justified on the ground that it preserves the *status quo*,[30] and at the same time leaves Congress a loophole. But the adoption of this alternative would only lead to a further diffusion of responsibility.

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[25] *The Supreme Court as Revolutionary*, THE NATION, Nov. 10, 1926, at 468.

[26] (1789) 1 ANNALS OF CONGRESS, 480; see Fairlee, *The Administrative Powers of the President* (1903) 2 MICH. L. REV. 190, 201.

[27] Fairlee, *op. cit. supra* note 26, at 200.

[28] Powell, *Spinning out the Executive Power*, THE NEW REPUBLIC, Nov. 17, 1926, at 369.

[29] United States v. Perkins, *supra* note 6.

[30] "The principle is vague but the practice is certain: the President may remove his appointees." BEARD, AMERICAN GOVERNMENT AND POLITICS (1911) 193, n. 1.

DEFERRED SETTLEMENTS IN LIFE INSURANCE— "TRUSTS" OR "DEBTS"

The dangers attending the investment of considerable sums of money in the hands of inexperienced beneficiaries has in recent years led most life insurance companies to provide plans for safeguarding life insurance funds by various methods of postponed payment.[1] Forms for typical methods of deferred settlement are provided in particular cases, but many modifications of these methods are made, and special clauses may be drawn in order that the peculiar needs of the beneficiary according to age, wealth, environment or otherwise may be satisfied.

Such a special arrangement was involved in the recent case of *Cronbach v. Cronbach.*[2] Joseph Cronbach procured the Aetna Life Insurance Company to issue eight policies insuring his life, each policy being for the sum of $5,000. Under a reserved power to change the beneficiary, the insured procured the company to change the beneficiary clauses of these policies to provide that upon the death of the insured the company was to retain the net sum ($40,000) and pay to the wife and daughter of the insured monthly interest at the rate of 30/100 of 1% ($120 per month, 3.6% annually) without the right of withdrawal of any part of the principal sum by the wife or daughter until

[1] These plans of deferred settlement, known as "optional methods of settlement," commonly include an arrangement whereby the money may be left on deposit and interest paid to the beneficiary, either for life with remainder over to another beneficiary, or, at the will of the beneficiary, conditioned on other circumstances fitted to the need of the particular case. Another option commonly provided is for the transmutation of the proceeds of the policy into installments, either for a specified term of years or for the entire life of the beneficiary. In practice, however, numerous modifications of these plans are made.

Two methods of providing these settlements are in use. (1) By a fiduciary contract. By indorsement, the beneficiary of the policy is made the X Insurance Company, Fiduciary. Then the insured signs a request for a fiduciary contract, the company issues the contract at its home office and mails it directly to the insured. The agreement of the company is to hold and dispose of what proceeds it shall receive as beneficiary. This method is in use by only a few companies. (2) By a policy or settlement agreement. When informed of a policyholder's wishes, a request embodying the mode of payment is prepared and submitted for his approval. When signed and returned, an agreement containing the dispositionary parts of the request is prepared, executed by the company and attached to the policy. This method is in general use by most insurance companies.

The above is based upon a statement of such plans contained in a recent book. HORTON, THE CONTROL BY AN INSURED OF THE PROCEEDS OF HIS POLICIES (1926). Many of the cases cited *infra* are there collected.

[2] Decided in Tennessee in 1926. The decision here discussed is that of the chancellor in the court below. The case on appeal is reported in Cronbach v. Aetna Life Ins. Co., 284 S. W. 72 (Tenn. 1926). See *infra* note 3.

the expiration of a period of twenty years from the death of the insured. Thereafter it was to be optional with the wife, if living, otherwise with the daughter, to continue to receive interest without the right of withdrawal of any part of the principal sum, or to elect payment of the principal sum, less unearned interest, if any, in installments payable during twenty years, without the right of commutation of installment payments by the wife or daughter. Upon the death of both beneficiaries, the principal sum less unearned interest, if any, or the commuted value of any unpaid installments, as the case might be, was to be payable to persons designated by way of remainder.

Before his death, the insured had made a parol expression of intention to change the beneficiary clause. Upon his death, suit was brought by his wife to have this last wish of the decedent given effect so as to make her the sole beneficiary of the policies and to permit her to receive payment in a lump sum; or if this could not be done, that the insurance company be ordered to pay the principal sum of $40,000 into the registry of the court, or to some bank or trust company to be selected, so that a greater sum by way of interest might be realized. The chancellor before whom the case arose denied the first demand on the ground that the attempted change of beneficiary was invalid. In his discussion of the second demand, the chancellor assumed that the insurance company was a trustee, and denied relief on the ground that there had been shown no violation of the trust, and that the greater security afforded the principal and interest under these provisions, effectuating the intent of the insured, justified a rate of interest lower than might ordinarily be secured.

Plans for the payment of insurance proceeds in other than one sum immediately upon the death of the insured, although now of frequent occurrence and of increasing importance in the life insurance business, are so new that their nature, so far as appears, has not as yet been the subject of judicial determination. It is therefore surprising to find the chancellor assuming, without any discussion, that the arrangement in the *Cronbach* case created a trust.[3] It is proposed to consider whether there is justification for such a view, and whether the relationship set up between the insurance company and the beneficiary of a deferred settlement policy should be treated as one of trustee and cestui que trust, or merely as one of debtor and creditor.

[3] On appeal, the Supreme Court of Tennessee contented itself with a discussion of the attempted change of beneficiary, and made no mention at all of the trust issue. It does not appear that either of the parties raised this issue on appeal. The assumption by the chancellor of the exist-

The jural consequences of a set of operative facts which have previously been determined as creating a "trust" or a "debt" have been fairly well delimited.[4] Likewise the factors governing the choice of concepts have frequently been laid down. Yet the cataloguing of these facts into one group or the other has often been a matter of great difficulty in practice.[5] Thus it is elementary that every trust must have specific property as its subject matter, and that the existence of a trust fund is essential to the existence of a trust.[6] Superficially, this would seem to determine the issue raised, since the custom and usage of the insurance business makes it clear that the insurance company does not segregate a particular fund for the payment of a particular beneficiary. That the matter cannot so easily be disposed of is due, on the one hand, to the peculiar nature of the insurance contract,[7] and on the other, to the consideration that in certain instances some courts have not hesitated to depart from the accepted rules of trusts for the purpose of reaching a result which to them seemed desirable.

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ence of a trust is likewise due probably to the fact that both parties were interested in having the transaction labelled as a trust, and argued the case on this assumption.

[4] These consequences may generally be summarized as follows: (1) A trustee occupies a fiduciary relation, and his obligation is ordinarily enforceable only in equity, while a debtor is not a fiduciary, and his obligation is ordinarily enforceable in a court of law. (2) Loss without fault by a trustee is excused. [But the responsibility of a fiduciary for the preservation of the fiduciary res may be increased by the terms of a bond or other special undertaking given by him. Smythe v. United States, 188 U. S. 156, 23 Sup. Ct. 279 (1903). See dissenting opinion in Chicago, B. & Q. R. R. v. Bartlett, 120 Ill. 603, 11 N. E. 867 (1887); COSTIGAN, CASES OF TRUSTS (1925) 87, n.] A debtor may be responsible irrespective of fault. (3) In case of bankruptcy, the cestui can take from the assets of the bankrupt trustee the specific trust property if he can identify it. In case of debt, the creditor must share pro rata. (4) The Statute of Limitations, if applicable, does not begin to run against a trustee until he has repudiated the trust obligation. Against a creditor's claim it begins to run from the maturity of the debt. (5) A trustee will be guilty of embezzlement if he converts trust funds to his own use. A debtor has no funds which can be the subject of conversion. See BOGERT, TRUSTS (1921) c. 2.

[5] BOGERT, *op. cit. supra* note 4, at 18.

[6] Finlayson, P. J., in Ex Parte Lamb, 61 Calif. App. 331, 328, 215 Pac. 109, 112 (1923): "To the creation of a trust, a trust *res* or subject matter is a *sine qua non*." Dunn, J., in Marble v. Marble's Estate, 304 Ill. 229, 240, 136 N. E. 589, 594 (1922): "It is always necessary to a trust that there shall be a particular piece of property or a certain fund to be held or dealt with in a particular manner for the benefit of another." See also Gough v. Satterlee, 32 App. Div. 33, 40, 52 N. Y. Supp. 492, 497 (2d Dept. 1898); BOGERT, *op. cit. supra* note 4, at 3; Long, *The Definition of a Trust* (1922) 8 VA. L. REV. 426.

[7] ". . . Insurance is not, as is sometimes hastily assumed, a mere application of Contracts and Agency, but is a separate subject, having

The peculiarity of the insurance agreement is exemplified in the situation which the beneficiary occupies. As a third party beneficiary of a contract, his rights might properly have been held to be destructible by the mutual agreement of the two principal parties. Yet it is well recognized that his rights are "vested" and indefeasible.[8] Probably the theory of a declaration of trust by the insured [9] best describes the result, and such a theory has been found helpful in the solution of some difficult problems in insurance law.[10] It may be harmonized with orthodox trust rules by considering the trust res as the claim against the insurance company which the insured holds for the benefit of the third party. Some courts, adopting this theory, do not discuss the question as to who the trustee is;[11] others consider the insured as the trustee.[12] There appears to be no case, however, which treats the insurance company as the trustee.[13] Yet this is the relationship which must be assumed to exist before the arrangement under a deferred settlement may be treated as a trust.

The objection to considering the transaction as creating such a relationship lies in the fact that to do so would violate the orthodox trust principles that an obligor may not be the trustee of his own obligation,[14] and that an identifiable res is essential

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peculiar doctrines of its own. . . ." WAMBAUGH, CASES ON INSURANCE (1902) Preface; see Wilson v. Commercial Union Assur. Co., 90 Vt. 105, 109, 96 Atl. 540, 542 (1916).

[8] For an analysis of the legal relations involved see (1925) 34 YALE LAW JOURNAL, 533.

[9] See Vance, *The Beneficiary's Interest In a Life Insurance Policy* (1922) 31 YALE LAW JOURNAL, 343.

[10] Thus, where the beneficiary predeceased the insured, some courts have held that the insured had the right to designate a new beneficiary on the theory of a lapsed trust. Vance, *op. cit. supra* note 9, at 356. And where the beneficiary murdered the insured, it was held that a trust resulted to the representatives of the insured. *Ibid.*; see (1926) 35 YALE LAW JOURNAL, 759.

[11] Pingrey v. Nat'l Life Ins. Co., 144 Mass. 374, 11 N. E. 562 (1887); Small v. Jose, 86 Me. 120, 29 Atl. 976 (1893); Schmidt v. Northern Life Ass'n, 112 Iowa, 41, 83 N. W. 800 (1900).

[12] Kerr v. Union Mutual Co., 69 Hun, 393, 23 N. Y. Supp. 619 (Sup. Ct. 1893); Fuchs v. New York Mut. Life Ins. Co., 104 N. Y. Supp. 105 (Sup. Ct. 1917). See (1911) 24 HARV. L. REV. 227.

[13] A writer on the subject has made the statement that "The beneficiary is regarded as the cestui que trust and the insurance company as the trustee of the fund represented by the policy of which the insured may be regarded as the grantor." Robbins, *Vested Interest of a Beneficiary Under a Policy of Life Insurance* (1901) 53 CENT. L. J. 184. The statement is made as a suggestion of the attitude which should be taken in dealing with the problems suggested, *supra* note 10. No cases are cited, and there is no discussion of the trust problems which would be involved in such a view.

[14] See Samuels v. Drew & Co., 296 Fed. 882, 887 (C. C. A. 2d, 1924);

to the existence of a trust.[15] It may therefore be helpful to consider two somewhat analogous situations in which both of these tenets have been disregarded.

A direction given by a creditor to his debtor to pay a third person, when assented to by the debtor, has been held by some courts to make the debtor a trustee for the third person.[16] In some of these cases the rights of third party creditors were not involved,[17] and the result may be explained on the theory that, as between the beneficiary and the obligor or his assignees or representatives, it would be inequitable to allow the latter to deny his responsibility. Others arose in jurisdictions where a third party beneficiary had no standing in court,[18] and the result is an attempt to obviate the harshness of this rule. It seems clear that in this class of cases the rule that an obligor may

Glovin v. De Miranda, 76 Hun, 414, 419, 27 N. Y. Supp. 1049, 1052 (1st Dept. 1894); Marble v. Marble's Estate, *supra* note 6.

[15] See cases cited *supra* note 6.

[16] See SCOTT, CASES ON TRUSTS (1919) 48, n. 2.

[17] Eaton v. Cook, 25 N. J. Eq. 55 (1874); Central Trust Co. v. Burke, 1 Ohio, Nisi Prius, 169 (1895); Brogan v. Public Trustee, 34 New Zealand, 817 (1915). In Re Leigh's Estate, 186 Iowa, 931, 173 N. W. 143 (1919) L declared that he held $8,000 in trust for trustees of a church; he made a note for this amount, which the payees receipted and returned to him. No money was ever transferred, and no fund set apart. The court allowed recovery of the $8,000 against the personal representative of L on the theory that L was trustee of this amount. In Day v. Roth, 18 N. Y. 448 (1858) the so called cestui was allowed to recover as against the debtor and his transferee with notice; the result may be explained on the theory of a constructive trust imposed because of fraud on the part of the defendants. Where the relation of debtor and creditor exists, an agreement by the debtor recognizing the claim, and specifying particular property to be held by the debtor for the benefit of the creditor is sufficient to create a trust, at least as between the immediate parties. Hamer v. Sidway, 124 N. Y. 538, 27 N. E. 256 (1891); Butler v. Weeks, 12 Misc. 192, 33 N. Y. Supp. 1090 (Sup. Ct. 1895). See (1923) 9 VA. L. REV. 235.

[18] For a citation of cases see SCOTT, *loc. cit. supra* note 16; ANSON, CONTRACT (CORBIN'S ed. 1919) 335, n. 4. And see McFadden v. Jenkyns, 1 Phil. 153 (Ch. 1842); Moore v. Darton, 4 De G. & S. 517 (Ch. 1851). But see In re Caplen's Estate, 45 L. J. R. 280 (1876) and note in COSTIGAN, *op. cit. supra* note 4, at 152. In Murray v. Flavell, 25 Ch. D. 89 (C. A. 1883) a partnership agreement provided that, upon the dissolution of the partnership by the death of one of them, the executors or administrators of the deceased partner should be entitled to receive out of the net profits of the partnership business an annuity to be applied as such partner should by deed or will direct for the benefit of his widow and children, and in default of such direction to be paid to such widow, if living, for her own use. It was further provided that the annuity should be constituted a charge on the net profits of the business. One of the partners died insolvent, without having given any direction as to the payment of the annuity. The court held that the annuity did not form part of the testator's estate, but that by the articles a trust of it was created in favor of the widow, and that she was entitled to it free from the claims of the testator's creditors. See 13 HALSBURY, LAWS

not be the trustee of his own indebtedness was overlooked by these courts in an attempt to reach a result seemingly desirable.[19]

Again, where a person makes a deposit of money with no intention of having the identical money set apart or used, but with instructions that a similar amount is to be used for some specific purpose, an application of orthodox trust rules would necessitate considering the relationship created between the depositary and depositor as that of debtor and creditor, the debt being payable to another. This is the result reached by the English courts.[20] In this country, however, the great majority of the courts have reached an opposite conclusion, and have given the specific depositor priority over general creditors in the event of the insolvency of the depositary.[21] The reasons given for reaching this result have not been uniform. Some courts have treated the specific deposit as a special deposit,[22] the bank therefore not being entitled to mix the money deposited with its own, but being obligated to keep it separate to carry out the specific directions. This assumption is in direct conflict with accepted banking practice.[23] Others have held that an agency relation was created.[24] Some courts treat the transaction as creating a strict trust,[25] disregarding the fact that there is no res upon which to found the trust. Generally, the result

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OF ENGLAND (1910) 97. The court here raised a trust under an ordinary partnership agreement in which the res did not come into existence until the death of the partner. See Davis, *Spendthrift Trusts in Life Insurance* (1925) 5 BOSTON U. L. REV. 91, 95. The decision was questioned in Ehrmann v. Ehrmann, 72 L. T. R. 17 (1894) where on a similar state of facts it was held that no immediate trust was created, but that it was a trust to arise in the future, and would attach only upon the then existing assets. See 22 HALSBURY, *op. cit. supra*, at 51.

[19] "Equity did not shrink from expanding the concept of a trust to cover the case of a contract beneficiary." Note by Corbin in ANSON, *loc. cit. supra* note 18. See Corbin, *Contracts for the Benefit of a Third Person* (1918) 27 YALE LAW JOURNAL, 1008; Williston, *Contracts for the Benefit of a Third Person* (1902) 15 HARV. L. REV. 767.

[20] In re Barned's Banking Co., 39 L. J. Ch. 635 (1870). Where, however, the bank procures a particular fund to be set apart for meeting the obligation, the bank becomes trustee. Farley v. Turner, 26 L. J. Ch. 710 (1857).

[21] See COSTIGAN, *op. cit. supra* note 4, at 124.

[22] Massey v. Fisher, 62 Fed. 958 (C. C. Pa. 1894); First Nat'l Bank v. Propp, 198 Iowa, 809, 200 N. W. 428 (1924); People v. City Bank of Rochester, 96 N. Y. 32 (1884). The cases are collected in COSTIGAN, *op. cit. supra* note 4, at 125.

[23] See Stone, *Some Legal Problems Involved in the Transmission of Funds* (1921) 21 COL. L. REV. 507.

[24] Southern Exch. Bank v. Pope, 152 Ga. 162, 108 S. E. 551 (1921); State v. Farmer's Bank, 110 Neb. 676, 194 N. W. 865 (1923); Johnson v. Whitman, 10 Abb. Prac. (N. S.) 111 (N. Y. 1871).

[25] Mitchell v. Bank of Indianola, 98 Miss. 658, 54 So. 87 (1911); Lebanon

is based upon some feeling that a specific deposit is of a higher nature than a general deposit.[26] Where the transaction involved transmission by cable, recent cases have held that merely a debtor-creditor relationship was created.[27] This result, perhaps reached because it was harder to imagine a dealing with a specific res, may be evidence of a tendency back to the normal trust rule. The significant fact remains that the great majority of our courts have glossed over the difficulty of the absence of a res in order to reach a result which to them seemed desirable. The objection to this treatment is really based likewise on considerations of policy, the desirability of the result being questioned.[28]

Precedent exists, then, for applying trust principles to a transaction lacking the usual trust features if a sufficient reason in policy for so doing be found. Other objections to such a treatment of deferred settlement plans are not insurmountable, and may be disposed of more easily by viewing the arrangement as really constituting two transactions. During the life of the insured it would seem clear that the insurance company is acting in the same capacity in the deferred settlement cases as it is in cases of lump settlement, and that there is no basis for considering the insurance company as trustee during this period. On the death of the insured, insurance functions end, and the new relation which the company assumes is very similar to

Trust Co. & Safe Deposit Bank's Estate, 166 Pa. 622, 31 Atl. 334 (1895). See (1925) 9 MINN. L. REV. 583.

[26] See Woodhouse v. Crandall, 197 Ill. 104, 64 N. E. 292 (1902). It has been suggested that the "trust relationship" which the courts speak of in the specific deposit cases consists in the giving, in effect, of an equitable lien on the assets in favor of the specific depositor. COSTIGAN, *loc. cit. supra* note 22. Another suggestion is that the relation is akin to that in the American grain elevator cases, where the depositor of grain is a tenant in common of the mass. See (1922) 6 MINN. L. REV. 306; (1925) 23 MICH. L. REV. 532.

[27] Legniti v. Mechanics' Nat'l Bank, 230 N. Y. 415, 130 N. E. 597 (1921); American Express Co. v. Cosmopolitan Trust Co., 239 Mass. 249, 132 N. E. 26 (1921); Carmen v. Higginson, 245 Mass. 511, 140 N. E. 246 (1923); Gellert v. Bank of California, 107 Or. 162, 214 Pac. 377 (1923). *Contra:* State v. Grills, 35 R. I. 70, 85 Atl. 281 (1912). See Stone, *loc. cit. supra* note 23; (1923) 33 YALE LAW JOURNAL, 177.

[28] Two other banking transactions which some courts have treated as trusts though there was no identifiable res may be mentioned. (1) Where a draft restrictively endorsed "for collection and remittance" is deposited with a bank, and the bank makes the collection, some courts have held that the bank is trustee of the proceeds. Bank of Poplar Bluff v. Millspaugh, 275 S. W. 579 (Mo. App. 1925); Murray v. North Liberty Savings Bank, 196 Iowa, 729, 195 N. W. 354 (1923). Criticism of this result is based upon the same grounds as in the specific deposit cases. See (1926) 35 YALE LAW JOURNAL, 627; (1923) 72 U. PA. L. REV. 56. (2) Where a deposit made by A in a savings bank is changed to one for "A and B" or for "A or B," a few courts have held that the bank be-

that of a banking or trust company. In the case of an unfunded insurance trust, the procedure is for the insurance company, upon the death of the insured, to turn the proceeds over to the trust company, which holds them for investment.[29] And it has been held that the trust company may deposit the trust fund in its own savings department.[30] In the case of deferred settlements in policies of insurance, the insurance company, instead of withdrawing the amount of the claim from its assets and paying over such assets, retains this amount in its general assets, where it is already invested, although not as an ear-marked fund. Money left for investment is usually treated as a trust fund.[31] But the payment of interest has been held to negative the existence of a trust and to be evidence of a mere contract relation, since it contemplates the use of the funds.[32] This objection goes to the failure to segregate, and if the analogy of the specific deposit cases is accepted, the objection may be disregarded here as it was in those cases.

Another unusual feature of the plan is the payment of a fixed rate of interest. A trustee must not derive any profit from the trust,[33] and if the rate provided is a maximum rate, the earnings of the trustee might be entirely disproportionate to the services rendered. In the *Cronbach* case there is a provision that the principal sum is to be repaid *less unearned interest, if any*. It seems also that it is customary for mutual companies to provide that if the fund earns more than the stipulated rate of interest, a correspondingly greater amount will be allowed.[34] It has been held that a trustee may fix the income rate to the

comes a trustee. Booth v. Oakland Bank of Savings, 122 Calif. 19, 54 Pac. 370 (1898). See note in Costigan, *op. cit. supra* note 4, at 299; but *cf.* Molera v. Cooper, 173 Calif. 259, 160 Pac. 231 (1916); (1916) 4 CALIF. L. REV. 167.

[29] See HERRICK, TRUST DEPARTMENTS IN BANKS AND TRUST COMPANIES (1925) 225. The legality of unfunded insurance trusts seems not to be questioned. See Bogert, *Funded Insurance Trusts and the Rule Against Accumulations* (1924) 9 CORN. L. Q. 113. The legality of funded insurance trusts is still in doubt. *Ibid.;* and see authorities cited in HERRICK, *op. cit. supra* at 230, n. 2.

[30] Tucker v. New Hampshire Trust Co., 69 N. H. 187, 44 Atl. 927 (1897) (result, however, probably due to statutes involved); Herzog v. Title Guaranty Co., 148 App. Div. 234, 132 N. Y. Supp. 1114 (1st Dept. 1911), *aff'd* 210 N. Y. 531, 103 N. E. 885 (1913) (deposit of income from trust property as it accumulated; not a deposit of the principal of a trust fund); In re People's Trust Co., 169 App. Div. 699, 155 N. Y. Supp. 639 (2d Dept. 1915).

[31] BOGERT, *op. cit. supra* note 4, at 24.

[32] In re Broad, 13 Q. B. 740 (C. A. 1884); Pittsburgh Nat'l Bank v. McMurray, 98 Pa. 538 (1881); BOGERT, *loc. cit. supra* note 31.

[33] See Frost, *Rights of Trustees to Derive Indirect Profits from the Handling of Trust Funds* (1921) 6 VA. L. REG. (N. S.) 641.

[34] Thus the practice of the Aetna Life Insurance Company is to pay in addition to the 3½% interest guaranteed such excess interest as may be determined by the proper company officials. At the present time interest

beneficiary above a specified minimum.[35] It may also be argued that the business of mutual life insurance companies is not conducted for the purpose of creating profits, and that the trust fund is not therefore being used in the trustee's own business.[36]

Basically, then, the issue resolves itself into a consideration of whether a sufficiently compelling policy exists to warrant a court in disregarding normal trust requirements in dealing with deferred settlements of life insurance proceeds. It is doubtful whether such a policy can be found in the *Cronbach* case. Assuming the solvency of the insurance company, the contract theory fully protects the beneficiary and carries out the intentions of the insured. In case of insolvency, the beneficiary would only be entitled to share as a general creditor, and would have no claim for a preference. It would seem that the insured in taking out this policy was relying on the insurance company as such, and it cannot be inferred that there was a clear intention to create a trust. And it is doubtful whether the policy of granting priorities is desirable where the effect would be to deprive other creditors, many of them in the same class as this beneficiary except for the fact that their interest matures sooner, from a proportional share in the assets.

A more persuasive case for applying trust principles to deferred settlement plans arises where the intention of the insured to rely on the existence of a trust is clearly expressed. This element would seem to be present in cases where a provision against alienation by way of a spendthrift trust is incorporated in the policy.[37] In jurisdictions where spendthrift trusts are upheld as serving a useful public policy, it would seem desirable to uphold such a clause; a result which cannot be reached, in the absence of a statute, if the relationship is considered merely that of debtor and creditor. The policy of permitting insurance companies to act in such a case as trustees of a spendthrift trust has been recognized by statute in Pennsylvania[38] and Wisconsin,[39] where it is provided that the insur-

paid on proceeds left with the company under deferred settlement plans is at the rate of 4.8%.

[35] Herzog v. Title Guaranty Co., *supra* note 30; In re People's Trust Co., *supra* note 30; Clapp v. Emery, 98 Ill. 523 (1881).

[36] See HORTON, *op. cit. supra* note 1, at 45.

[37] See Davis, *Spendthrift Trusts in Life Insurance* (1925) 5 BOSTON U. L. REV. 91. It does not appear from the report of the Cronbach case that such a provision was contained in the policy there involved. Nor does it appear which if either of the methods of settlement mentioned *supra* note 1 was used.

[38] Pa. Stat. 1920, § 12264: "Whenever under the terms of any annuity or policy of life insurance, or under any written agreement supplemental thereto, issued by any company incorporated by, and doing business in this State, the proceeds are retained by such company at maturity or otherwise, no person entitled to any part of such proceeds, or any in-

ance company shall not be required to segregate insurance proceeds retained by it.[40] Statutory enactment should not be necessary to accomplish the result if the court is convinced of its desirability. It would seem, though, that a preferable solution would be to recognize that no trust as such exists, but that rights of a similar nature have been created for the purpose of meeting the needs of the particular situation. The insurance arrangement is so nearly unique in other respects that the adoption of a peculiar rule confined to a particular and well defined situation would not materially disarrange accepted concepts so as to prevent their application to other situations controlled by different policies.

THE DECLARATORY ACTION AS AN ALTERNATIVE REMEDY

Declaratory actions and judgments are comparatively new in this country. It is not surprising, therefore, that courts should give novel or unusual interpretations to statutes authorizing such actions and judgments, especially when the issuance of such judgments is left to judicial discretion. But in England, whence our statutes have been derived, the discretion has been largely hardened into rule, and is subject to appellate review. Nearly fifty years of British experience enable us, therefore, to measure and circumscribe the exercise of judicial discretion by established criteria and precedents.

In the recent case of *Loesch v. Manhattan Life Ins. Co.*, the New York Supreme Court[1] dismissed an action for a declaratory judgment on the ground that the plaintiff could have sued for damages in an action for breach of contract. Rule 212 of the New York Rules of Practice, carrying out section 473 of

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stallment of interest due or to become due thereon, shall be permitted to commute, anticipate, encumber, alienate, or assign the same, or any part thereof, if such permission is expressly withheld by the terms of such policy or supplemental agreement; and if such policy or supplemental agreement so provides, no payments of interest or of principal shall be in anyway subject to such person's debts, contracts, or engagements, nor to any judicial processes to levy upon or attach the same for payment thereof; and, further, that such company shall not be required to segregate such funds, but may hold them as a part of its general corporate funds."

[39] Wis. Laws 1923, c. 111.

[40] The adoption of such a rule generally would undoubtedly lead to a great extension of insurance business in a field now occupied by trust companies, and the taking over of trust company functions as distinct from insurance functions proper. The desirability of such a result should be an important element in a judicial determination of the nature of the relationship involved.

[1] New York Supreme Court, Spec. T. Part IV, Cotillo, J., 76 N. Y. L. J., No. 42, Nov. 20, 1926.

the Civil Practice Act, authorizes the court to decline to render a declaratory judgment if, in its opinion, "the parties should be left to relief by existing forms of actions." Inasmuch as the court appears to have relied upon a quotation from 28 YALE LAW JOURNAL in thus limiting the function of the declaratory action,[2] it seems proper to suggest that the court has misinterpreted the scope of the remedy by deeming it an exclusive remedy applicable to certain situations only, instead of accepting it, as the British precedents clearly demonstrate, as an alternative remedy, applicable to practically every situation. The New York court is not the first thus to mistake the scope of the declaratory judgment.[3]

The facts in the case before the court were as follows: A life insurance company (the defendant) made a contract with an agent (the plaintiff) in 1913 giving him exclusive control of the territory in New York City. According to the plaintiff, the contract as amended, was not terminable by the company until 1928. The agent was to receive compensation by commissions decreasing from 50 per cent in the first, to five per cent in the fifteenth year, on premiums obtained through him. If the contract remained in force more than fifteen years the company was to pay the agent three per cent on renewal premiums during the continuance of the contract; if terminated presumably before the fifteenth year, the renewal premiums were to be collected by the company, deducting therefor two per cent from any commissions due the agent. The company discharged the agent in 1926. The agent, apparently denying the validity of the discharge, and claiming that he is under commitments to third persons which require him to know what

[2] "Its purpose is to afford security and relief against uncertainty and doubt. It does not *necessarily* presuppose culpable conduct on the part of the defendant, but it enables any party whose rights, privileges, powers or immunities, whether evidenced by a written instrument or not, have been disputed, endangered, threatened or placed in uncertainty by another person, to invoke the aid of a court to obtain an authoritative determination or declaration of his rights or other legal relations." (1918) 28 YALE LAW JOURNAL, 1, 4. The court gave no effect to the important word "necessarily."

[3] See In re List's Estate, 283 Pa. 255, 129 Atl. 64 (1925) in which the court suggested, by way of dictum, that the declaratory action could only be employed when no ordinary form of action was available and that the main purpose of the declaratory procedure was to insure a speedy determination of issues "which would otherwise be delayed, to the possible injury of those interested, if they were compelled to await the ordinary course of judicial proceedings." There is no authority in the history of declaratory procedure for such an unusual conclusion. See also Kaleikau v. Hall, 27 Hawaii, 420 (1923) in which the court refused to try by declaratory action the conflicting claims of title to office by two sets of officials in a fraternal society, on the ground that quo warranto proceedings should be brought.

his rights are, asks for a declaration of his right not to have the company deduct the two per cent from his commissions and of the company's duty to pay him three per cent on renewal premiums after the fifteenth year. The issue apparently turned on the single question whether the company was privileged to discharge the agent, and like most judgments, it would have determined the legality both of past and future conduct. The court declined to make the declaration requested, on the ground that the agent could have brought an action for an "anticipatory" (?) breach of contract under existing forms of procedure. In our opinion, the court should not have declined the declaration on such a ground.

The Civil Practice Act, which closely follows the English Order XXV, rule 5, of 1883, provides that the Supreme Court shall have power "in *any* action or proceeding to declare rights and other legal relations . . . *whether or not* further relief is *or could be claimed*." [4] These words have a history. The Chancery Procedure Act, 1852, section 50, gave the English courts the power to make declarations of right "without granting consequential relief." The courts of equity narrowed the power greatly by construction, and finally almost emasculated it by asserting that such declaration would only be made as an incident to coercive relief or where there was a "right" to consequential relief for which the plaintiff had merely chosen not to ask.[5] It was the desire completely to dissociate the power to issue a declaration from the professed requirement of the existence or non-existence of any further coercive relief which induced the amendment of 1883 authorizing declarations "whether any consequential relief is or could be claimed or not." In England, therefore, the utmost freedom prevails in instituting actions either for coercive relief, such as damages or injunction, or for a declaration of rights merely, or combining the two. The advantage of the latter procedure, as pointed out elsewhere, is that where a request for an injunction is combined with a request for a declaration, the injunction may for technical reasons be denied, and yet the declaration issue,[6] thus subserving the important purpose of the action by determining the rights of the parties.

The narrow construction given to the Civil Practice Act by the New York Supreme Court in the instant case closely resembles the limited power given the courts of British India by the Specific Relief Act of 1887, section 42, which, while making

[4] Italics ours.

[5] See Rooke v. Lord Kensington, 2 K. & J. 753, 760 (Ch. 1856); 28 YALE LAW JOURNAL, at 27. This view of the scope of the declaratory judgment would have resulted in a declaratory judgment in the Loesch case.

[6] 28 YALE LAW JOURNAL, 105.

it unnecessary for the plaintiff to be entitled to any coercive relief, bars the courts from making declaratory decrees *only* in cases where the plaintiff, being able to seek coercive relief, fails to request it.[7] This also was the early construction of the German Supreme Court [8] and reflects the existing German practice, which requires a plaintiff to seek his most drastic remedy, overlooking the advantages of arbitration or friendly submission over hostile litigation and personal enmity in having one's legal relations determined.

The New York court appears to have been misled into believing that the declaratory action lay only where no coercive relief could be claimed by the clause in rule 212 permitting the court to decline a declaration if the court believed "the parties should be left to relief by existing forms of action." This requires explanation, whether or not one agrees with the court that the agent should have brought an action for breach of contract. If it meant that a declaration should not be issued if coercive relief was obtainable in an existing form of action, as the court evidently assumed, then the rule would practically nullify the clause in the Act itself, "whether or not further relief is or could be claimed." This obviously contemplates that a declaratory action may be brought notwithstanding the fact that coercive relief might also have been claimed. But the doubt is removed by the practice in England when other remedies are available. The only occasions when the declaratory judgment is declined because of the existence of other remedies is when a special statutory proceeding exists for dealing with the very type of case submitted for declaration, or where jurisdiction has been conferred on some special tribunal.[9] There have been cases where the court has felt that the relief sought could best be obtained by some other form of action, but this has been applied to cases in which the court was asked to declare the invalidity of a tax law or of an assessment under such law, and the court believed that the claimant could adequately try the question in a defense against enforcement pro-

[7] Section 42 of the Specific Relief Act contains this proviso: "Provided that no court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so." COLLETT, THE LAW OF SPECIFIC RELIEF IN INDIA (1882) 224; SARKAR, THE SPECIFIC RELIEF ACT (4th ed. 1922) 169; SARKAR, THE CIVIL PROCEDURE CODE (ACT XIV OF 1882) (1895) §§ 11, 283; 28 YALE LAW JOURNAL, at 29.

[8] German Supreme Court, 4 R. G. 437 (1881). This decision was so severely criticized by Bahr, one of the draftsmen of the code of civil procedure, that the court later reversed its position. See the development of the practice in 28 YALE LAW JOURNAL, at 16–20.

[9] Money expended on public works recoverable only in a court of summary jurisdiction. See Barraclough v. Brown [1897] A.C. 615, 623; Grand Junction Waterworks Co. v. Hampton U. D. C. [1898] 2 Ch. 331; Bull v.

ceedings.[10] The court's discretion is necessarily guided by the expediency of issuing a declaration, *i. e.*, whether it will serve a useful purpose, whether it will remove the uncertainty or settle the controversy or enable the parties to adjust their conflicting claims. The mere fact that another remedy exists is no ground at all, of itself, for refusing the declaration. The English and Colonial courts regard the declaratory relief as an alternative remedy,[11] and where a regular action and a declaratory action might both lie, give the plaintiff his choice. The inference that by permitting a declaratory action where a stronger action might lie, litigation is increased, is not confirmed by experience. Both the German and the English courts once feared this, but the apprehension has admittedly proved unjustified. On the contrary, the narrowing of the issue and the tendency to avoid technicalities of pleading have diminished litigation; and it has practically never been necessary, after a declaratory judgment defining the rights of the parties, again to resort to the court for a further coercive decree.

The declaratory judgment is of course often invoked, and serves perhaps its most effective purpose, in cases where no coercive relief is possible—for example, in the interpretation of written instruments before breach or violation or injury, or generally to remove uncertainty and doubt from legal relations that are disputed, threatened or placed in uncertainty by adverse claims. But to regard this, while the more striking, as the exclusive function of the declaratory judgment is a grievous error, and would be bound to hamper the growth of this form

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Att'y Gen. of N. S. Wales [1916] 2 A. C. 564. Claims for exemption from military service. Flint v. Att'y Gen. [1918] 1 Ch. 216. Jurisdiction over claims for exemption from taxation given to Board of Assessment. New York & Ottawa Ry. v. Cornwall, 29 Ont. L. R. 522 (1913). Invalidity of a patent triable by petition for revocation. N. E. Marine Engineering Co. v. Leeds Forge Co. [1906] 1 Ch. 324. See also 28 YALE LAW JOURNAL, at 114.

It is of course necessary to sue for a declaration in a court having jurisdiction over the subject-matter in controversy. Thus, a questioned title to real estate under a will should have been tried in the law, not chancery, court. Paterson v. Currier, 98 N. J. Eq. 48, 129 Atl. 711 (1925); Wight v. Board of Education, 133 Atl. 387 (N. J. 1926); In re Gooding's Will, 124 Misc. 400, 208 N. Y. Supp. 793 (Surr. Ct. 1925).

[10] Toronto Ry. v. City of Toronto, 13 Ont. L. R. 532 (1906); Ottawa Y. M. C. A. v. Ottawa, 29 Ont. L. R. 574 (Ont. App. Div. 1913); Att'y Gen. for Queensland ex rel. Goldsborough v. Commonwealth, 20 Com. L. R. 148 (Austr. 1915).

[11] For example, instead of suing out a petition of right against the crown, it is becoming common to ask a declaration of rights. Dyson v. Att'y Gen. [1911] 1 K. B. 410; Burghes v. Att'y Gen. [1911] 2 Ch. 139; China Mutual Steam Navigation Co., Ltd. v. Maclay [1918] 1 K. B. 33; cases discussed in ROBINSON, PUBLIC AUTHORITIES AND LEGAL LIABILITY (1925) 266–271.

of relief. In the instant case, the insurance agent wished by the declaratory judgment requested, to have an authoritative guide for his commitments to third parties and it would seem that in thus removing uncertainty, a useful purpose would have been served. But even if an action for damages would equally have served, there was no justification, on that ground alone, it is submitted, for refusing a declaratory judgment. In the declaratory action, practically the whole issue could have been determined, with possibly an accounting to follow. Even the amount of damages, if such are claimed, could be determined by declaration, with the aid of a jury if requested. Had the company refused to carry out the judgment a further coercive decree would have been a mere formality. Why compel the most drastic and extreme remedy, when the milder declaration of rights will fully satisfy the plaintiff's requirements? Why prefer a hostile campaign with irreparable breach of friendly relations to the more amicable method of arbitration of conflicting views of the law and the clarification of uncertainty? The mere fact that the wrongful act complained of had already been committed and that another form of action was therefore available has not been deemed in England or in most of our states a legitimate ground for declining to decide the rights of the parties by declaratory judgment. Self-restraint, the willingness to invoke arbitration and declaration of rights instead of hostilities and coercion is a mark of civilization, and should be encouraged, not discouraged. To conceive of the declaratory judgment as if it were an extraordinary legal remedy like mandamus or habeas corpus, or even an exceptional remedy like injunction, not grantable when an ordinary remedy is available, involves a serious mistake. It is not supported by history or precedent, and its perpetuation by further decisions would impair the valuable social function which the declaratory procedure was designed to perform.

E. M. B.

DOMICIL OF CHOICE—FIXED RULES

In order to determine the law relating to change of domicil[1] in any state or country, it is essential to scrutinize what the courts have actually done and are now doing even more carefully than the principles they enunciate or the formal explanations of

[1] Domicil affects: (a) status, such as legitimacy, adoption and divorce; (b) transfer by act of law of a personal estate as a whole, as for instance at death; (c) the incidence of personal taxes; and (d) judicial jurisdiction. AMERICAN LAW INSTITUTE CONFLICT OF LAWS RESTATEMENT NO. 1 (1925) § 10.

their decisions.[2] Even a cursory reading of the cases will show that, although the courts of the various states profess to decide the cases which come before them according to "the rule" of their jurisdictions, there is at least as much variance in the interpretation of any state rule as there is between the rules adopted by the several states.[3] In a single state such as Connecticut, the courts have, at times, stated as requirements for a change of domicil, actual residence in a new place with the intention of remaining permanently;[4] residence with either the absence of an intention to remove elsewhere or the presence of an intention to remain for an indefinite period,[5] or actual change of residence with the dual intention of abandoning the old home and making either a new permanent home or a home for at

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[2] "We shall therefore undertake to formulate general statements as to what the 'law' of a given country 'can' or 'cannot' do in the way of attaching legal consequences to situations and transactions by observing what has actually been done. In making our observations we shall, however, find it necessary to focus our attention upon what courts have *done*, rather than upon the description they have given of the reasons for their action. Whatever generalizations we reach will therefore purport to be nothing more than an attempt to describe in as simple a way as possible the concrete judicial phenomena observed, and their 'validity' will be measured by their effectiveness in accomplishing that purpose. In other words, they will be true in so far as they enable us to handle effectively the concrete materials with which we must deal." Cook, *The Logical and Legal Bases of the Conflict of Laws* (1924) 33 YALE LAW JOURNAL, 457, 460. Professor Dewey in a discussion of *Logical Method and Law* (1924) 10 CORN. L. Q. 17, points out that the meaning and worth of general principles are subject to inquiry to be made in the light of the consequences of the use of those principles, and that the syllogism used in formal decisions sets forth the results of thinking, but has nothing to do with the operation of thinking.

Definitions of the legal requirements for change of domicil are perhaps particularly unsatisfactory. ". . . definitions of domicil of choice are usually defective. . . . Many of them are not properly definitions at all, but mere formulae of evidence framed apparently for the purpose of succinctly stating the most usual criteria by which domicil of choice is determined." JACOBS, LAW OF DOMICIL (1887) § 68.

[3] For the different interpretations and rules applied in Connecticut, Massachusetts, and Kentucky, the three states involved in the instant case, see *infra*, notes 4, 5, 6, 7 and 8.

[4] Yale v. West Middle School Dist., 59 Conn. 489, 491, 22 Atl. 295, 296 (1890) (domicil distinguished from residence for purposes of admitting child to school). For a similar Massachusetts holding see Kapigian v. Krikor der Minasian, 212 Mass. 412, 413, 99 N. E. 264 (1912) (suit to annul marriage); and for a similar Kentucky case see Staier's Admr's v. Commonwealth, 194 Ky. 316, 319, 239 S. W. 40, 42 (1922) (action for inheritance tax).

[5] See Gildersleeve v. Gildersleeve, 88 Conn. 689, 692, 92 Atl. 684, 686 (1914) (action for divorce). For a similar Massachusetts case see Winans v. Winans, 205 Mass. 388, 391, 91 N. E. 394, 396 (1910) (action for divorce).

least an indefinite period in the new place.[6] Sometimes the Connecticut courts have required only a present intention to make the new place of residence a home or domicil for the time being,[7] and in a few cases the courts of other states have even held that domicil, in the last analysis, is mainly a question of fact and cannot be decided by the application of any fixed rule.[8]

The recent case of *McDonald v. Hartford Trust Co.*, 104 Conn. 169, 132 Atl. 902 (1926) shows to what lengths a court may be driven to reach a sound result when the facts in the case are unusual and the court deems itself obliged to apply a fixed rule in regard to the acquisition of a domicil of choice. The plaintiff's husband left Massachusetts, his domicil of origin, intending never to return, and went to Kentucky on business with the intention of remaining there indefinitely. He lived there nineteen years. While in Kentucky he married the plaintiff, who entrusted certain funds to him for investment purposes, which funds he in good faith mingled with his own. Such mingling, according to a Kentucky statute, destroyed the wife's legal ownership. In order not to apply this statute to the distribution of the husband's estate, the Connecticut court held that the husband, throughout his stay in Kentucky, remained domiciled in Massachusetts. The court, in an attempt to justify its decision, professed to follow the "Connecticut rule," which requires for a change of domicil an intention to make the new place of residence a permanent domicil, an actual residence in the new place, and the intention to abandon the old domicil. An examination of the Connecticut cases, however, does not show the adoption of such a rule.[9]

There are, then, in the several common law states not only different requirements for the establishment of a domicil of choice, but the courts in almost any single state will be found to apply different rules when different problems arise. In cases involving domicil, the courts seem to have gone exceptionally far in recognizing, though tacitly, that, although fixed rules are helpful guides in the general run of cases, when, in specific cases, these same rules force socially unsound results, they must

[6] Gold v. Gold, 100 Conn. 607, 124 Atl. 246 (1924) (protesting jurisdiction of probate court). Likewise in Massachusetts. Emery v. Emery, 218 Mass. 227, 105 N. E. 879 (1914) (petition for proof of will).

[7] See Roxbury v. Bridgewater, 85 Conn. 196, 200, 82 Atl. 193, 194 (1912) (vagrant intending to make home and domicil wherever he worked, held to have changed his domicil from time to time accordingly). The Massachusetts court held similarly in Wilbraham v. Ludlow, 99 Mass. 587, 591 (1868) (action to recover money spent on pauper).

[8] White v. Stowell, 229 Mass. 594, 119 N. E. 121 (1918) (protest against jurisdiction of probate court); see Robinson v. Paxton, 210 Ky. 575, 580, 276 S. W. 500, 503 (1925) (same).

[9] See cases cited *supra* notes 4, 5, 6, 7.

yield. Such a view alone can explain the different rules which have been applied by the courts of a single state where domicil is to be established for different purposes, or where there is a wide variation in the facts involved. Less is required to show a change of domicil between states than between nations,[10] and some courts have refused to apply the "reverter doctrine" where a native citizen of another country has come to reside here and has both acquired a domicil and renounced his original allegiance.[11] Query, whether the decision would have been the same if it had been the case of an American who went abroad. The liberal attitude of the courts in allowing a wife who has grounds for divorce to acquire a domicil for other purposes is based on the social needs involved,[12] as is the recognition that the requirements for a change of domicil should be more stringent for some purposes than for others. It is only thus that one can explain the failure of the courts to inquire as to the intention of a person to remain, when he enters a state where there is a broad divorce law, and seeks a divorce there as soon as the statutory requirements for residence are fulfilled. In other instances, also, a domicil of choice has been recognized even though some of the usual requirements were lacking. Thus residence for a definite period, as for completion of a college course, has been deemed sufficient to establish a domicil for voting purposes,[13] and a soldier has been allowed a domicil although his residence was for a definite and limited period.[14]

In order to achieve this elasticity, there has been continuous change in the concept of the intent which must accompany the physical movement if a new domicil is to be recognized.[15] Owing

[10] Beale, *Proof of Domicil* (1926) 74 U. PA. L. REV. 552, 553; *cf.* Dupuy v. Wurtz, 53 N. Y. 556 (1873).

[11] In re Jones, 192 Iowa, 78, 182 N. W. 227 (1921).

[12] (1920) 30 YALE LAW JOURNAL, 631.

[13] Welsh v. Shumway, 232 Ill. 54, 83 N. E. 549 (1907); Pedigo v. Grimes, 113 Ind. 148, 13 N. E. 700 (1887).

[14] Ames v. Duryea, 6 Lansing, 155 (N. Y. Sup. Ct. 1871).

[15] The classical conception of intent in these cases is the intention to abandon the old domicil with the concurrent intent to gain a new domicil. (1919) 18 MICH. L. REV. 332; JACOBS, *op. cit. supra* note 2, §§ 125, 126. The courts have sometimes interpreted intent as the intention to remain permanently. MINOR, CONFLICT OF LAWS (1901) § 56. Or, as lack of intention to return. Farrow v. Farrow, 162 Iowa, 87, 94, 143 N. W. 856, 859 (1913). Or, as intention to remain indefinitely without definite intention of removal. MINOR, *op. cit. supra*, § 61. Or, as intention to remain until something indefinite happens. Harral v. Harral, 39 N. J. Eq. 279 (1884). Or, as intention to make a home. Beale, *The Progress of the Law* (1920) 34 HARV. L. REV. 50, 52; AMERICAN LAW INSTITUTE CONFLICT OF LAWS RESTATEMENT No. 1. (1925) § 21 (intent required for acquisition of domicil of choice is an intention to make a home in fact and not an intention to acquire a domicil). Or, as intent to acquire a new domicil. Denny v. Sumner County, 134 Tenn. 488, 184 S. W. 14 (1915).

to the complexity of modern life, which spells instability of residence for an increasing proportion of citizens, such a rule is no longer practicable in America. It would deprive too many individuals of privileges, which accompany legal residence, *i.e.*, domicil, in a community, and deprive the community of the rights which are correlative to the duties of a legal resident. So if A were sent by his business house from state X, his domicil of origin, to state Y with instructions to take from five to ten years to develop a branch of the firm and then move on to state Z to do the same thing, and so on, A could never acquire a domicil, although his stay in each place might be for a considerable time, although his family resided with him, and although he considered himself a member of the community. Likewise, where the rules of a church require that its ministers move from parish to parish at intervals of possibly five years, the ministers could never acquire a domicil of choice. Such examples might easily be multiplied. The majority of American courts, therefore, have adopted a more liberal rule which requires, for the establishment of a domicil of choice, intentional abandonment of the old domicil and actual residence in the new place with the intent to remain there indefinitely.[16]

The application of this more liberal rule would, in the instant case, have required the Connecticut court to hold the plaintiff's husband domiciled in Kentucky. Such a holding would have deprived the plaintiff of her property, which would have thus become part of her husband's estate. The advantage of a fixed rule for the acquisition of a domicil of choice is that it gives a definite standard to the courts for a large majority of cases.

[16] MINOR, *op. cit. supra* note 15, at § 61; STORY, CONFLICT OF LAWS (8th ed. 1883) 46; Winans v. Winans, *supra* note 5; Lucky v. Roberts, 211 Ala. 578, 100 So. 878 (1924); In re Titterington's Estate, 130 Iowa, 356, 106 N. W. 761 (1906); Nolker v. Nolker, 257 S. W. 798 (Mo. 1924); Felker v. Henderson, 78 N. H. 509, 102 Atl. 623 (1917); Presson v. Presson, 38 Nev. 203, 147 Pac. 1081 (1915); see Denny v. Sumner County, *supra* note 15, at 475, 184 S. W. at 16; Hayward v. Hayward, 65 Ind. App. 440, 450, 115 N. E. 966, 970 (1917); United States v. Knight, 291 Fed. 129, 133 (D. Mont. 1923) (notwithstanding "vague floating intent or hope to some time return to former place"). The definition approved by the United States Supreme Court in Williamson v. Osenton, 232 U. S. 619, 624, 34 Sup. Ct. 442 (1914) (domicil for divorce) and in Gilbert v. David, 235 U. S. 561, 569, 35 Sup. Ct. 164, 167 (1915) (domicil for federal jurisdiction) is that a change of domicil is effected where there is a change of abode and "the absence of any present intention of not residing permanently or indefinitely in the new abode." DICEY, CONFLICT OF LAWS (3d ed. 1922) 113. The majority of Connecticut cases seem to favor the rule which requires actual residence in the new place with the intention of remaining at least indefinitely. Gold v. Gold, *supra* note 6; Gildersleeve v. Gildersleeve, *supra* note 5; Fairfield v. Easton, 73 Conn. 735, 49 Atl. 200 (1901). See Roxbury v. Bridgewater, *supra* note 7, at 201, 82 Atl. at 194; but *cf.* Yale v. West Middle School Dist., *supra* note 4.

But the certainty is limited,[17] and the fixed rule has serious disadvantages. In cases with unusual facts, it forces the court either to make decisions which are socially undesirable, or in an effort to avoid such decisions, while still doing lip-service to the fixed rule, to strain and distort the rule in order to reach a sound result.

Even the application of the majority American "rule," requiring only the intent to remain indefinitely, would not supply a panacea for all difficult cases, and in the final analysis, it seems that the courts will decide unusual cases in which the question of domicil arises, chiefly on their specific facts.[18] Some courts have squarely faced this issue.[19] The Massachusetts Supreme Court in 1840 declared that "No exact definition can be given of domicil; it depends on no one fact or combination of circumstances, but from the whole taken together it must be determined in each particular case."[20] When domicil is thus recognized as an artificial notion, developed to aid the courts in deciding which of several laws to apply, the pragmatic test as to the particular conception to be applied may seem less startling.

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[17] Mr. Beale, although a protagonist of the fixed rule as set forth in the Restatement, recognizes that the certainty is limited, and says that substantive rules for regulating domicil finally must rest on evidence of certain facts, and as one of these is the mental attitude of the person concerned it is difficult to establish. Beale, *op. cit. supra* note 10.

[18] ". . . however great the appearance of purely deductive reasoning may be, the real decision where a case presents novel elements consists in a re-defining of the middle term of the major and minor premises of the syllogism; that is, of the *construction* or *creation of premises* for the case in hand, which premises did not pre-exist. . . . This view does not lead to the discarding of all principles and rules, but quite the contrary. It demands them as tools with which to work; as tools without which we cannot work effectively. It does, however, make sure that they are used as tools and are not perverted to an apparently mechanical use. It points out that the use never can be really mechanical; that the danger in continuing to deceive ourselves into believing that we are merely 'applying' the old rule or principle to a 'new case' by purely deductive reasoning lies in the fact that as the real thought-process is thus obscured, we fail to realize that our choice is really being guided by considerations of social and economic policy or ethics, and so fail to take into consideration all the relevant facts of life required for a wise decision." Cook, *op. cit. supra* note 2, at 487.

[19] See Robinson v. Paxton, *supra* note 8; Pettit's Executrix v. Lexington, 193 Ky. 679, 237 S. W. 391, 393 (1922); Sears v. Boston, 1 Met. 250, 251, 252 (Mass. 1840); *cf.* Winans v. Winans, *supra* note 5.

[20] See Thorndike v. Boston, 1 Met. 242, 245 (Mass. 1840).